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No. 96

IN THE
SUPREME COURT OF THE UNITED STATES
DECEMBER TERM, 1996

GARY A. MEYERS,
Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does an untrue statement by railroad counsel in the presence of the jury that plaintiff will soon "get a disability pension up to $2,000 a month" constitute an irremovably prejudicial comment which, under prior holdings of this Court, entitle an injured worker in an action brought under the Federal Employers' Liability Act to a new trial as a matter of law?

Assuming arguendo that an untrue statement regarding a collateral source is capable of being cured as a matter of law, was the trial court's instruction to the jury in the instant case sufficient to cure the prejudice caused by the statement of N&W's counsel in the presence of the jury?

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STATUTES

28 U.S.C. §1254(1) 1

Petitioner, Gary A. Meyers ("Meyers"), petitions as follows for a Writ of Certiorari to review the September 25, 1996, Opinion of the United States Court of Appeals for the Sixth Circuit (App. A, *infra*, pp. A-1 - A-2) which affirmed the judgment entered by the United States District Court for the Northern District of Ohio, Western Division, on February 28, 1995. (App. B, *infra*, pp. B-1 - B-6).

OPINIONS BELOW

The judgment of the United States District Court for the Northern District of Ohio, Western Division, entered on February 28, 1995, (App. B, *infra*, pp. B-1 - B-6) is not published, and neither is the Opinion of the United States Court of Appeals for the Sixth Circuit entered on September 25, 1996 (App. A, *infra*, pp. A-1 - A-2).

JURISDICTION

Petitioner, Gary A. Meyers, seeks to invoke the jurisdiction of this Court to review the September 25, 1996, Memorandum Opinion of the United States Court of Appeals for the Sixth Circuit (App. B, *infra*, pp. B-1— B-6) pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This appeal involves the application of the collateral source rule as interpreted by this Court under the Federal Employers' Liability Act and does not involve the interpretation of any constitutional, statutory or regulatory provisions.

STATEMENT OF THE CASE

A. Procedural Posture:

This Petition for Writ of Certiorari ("Petition") arises from a Complaint filed by Plaintiff-Petitioner Gary A. Meyers ("Meyers") under the Federal Employers' Liability Act ("FELA") against his employer, Norfolk and Western Railway Company ("N&W"). Meyers' Complaint seeks damages for negligently caused permanent injury to the ulnar nerve in his left arm suffered while he was making repairs on a crane in the course of his railroad employment. A jury decided the case in favor of N&W on December 16, 1994.

On January 3, 1995, Meyers filed a Motion for a New Trial mainly on the ground that counsel for N&W had created irremovable, prejudicial error by stating in the presence of the jury, in the form of a question to Mrs. Meyers, that her husband is "**going to get a disability pension up to $2,000 a month**" (Gail Meyers, TR Vol. 2, p. 368). Meyers contended that because this statement is untrue, misleading, and contrary to the express prohibition against the introduction of collateral benefits established by decisions of the United States Supreme Court, he is entitled to a new trial.

On February 28, 1995, the trial court overruled Meyers' Motion for a New Trial (R. 58, Judgment). On March 28, 1995, Meyers filed a timely Notice of Appeal from the district court's judgment entry overruling Meyers' motion for a new trial. (R. 60, Notice of Appeal). On September 25, 1996, the United States Court of Appeals issued its Memorandum Opinion affirming the judgment of the United States District Court for the Northern District of Ohio, Western Division.

B. Facts:

1. Background

Gary Meyers, a 38 year-old husband and father of two dependent children, was attempting to repair an N&W crane when he suffered a crushing injury to his left elbow causing permanent and irreversible damage to the ulnar nerve in his left arm. (Dr. Dwight, TR Vol. 1, p. 155). Meyers, who was described by his supervisors as a conscientious employee with an excellent work record, sued N&W on the grounds that N&W had failed to provide him with a safe place to work, safe and suitable equipment for the assigned task, and with the necessary training for the safe performance of his work. At the time of trial, Meyers had returned to work and there was no claim that Meyers would ever be without gainful employment. To the contrary, the testimony and evidence was that, if Meyers ever became unable to perform his railroad duties, he would always be able to find alternative employment because of his strong work ethic. (Robert Ancell, TR Vol. 2, pp. 338, 339).

Petitioner's economist, Dr. Norman Eckel, based his calculations of lost future earnings on the assumption that Meyers will be employed indefinitely but will suffer diminished earning capacity because of his injuries. (Dr. Eckel, TR Vol. 2, pp. 374-375).

2. The testimony of Mrs. Gail Meyers

The final witness called by plaintiff was Mrs. Gail Meyers, who testified regarding the effects of her husband's injuries on his life. Because what occurred during the cross-examination of Mrs. Meyers forms the basis on which her husband seeks a writ of certiorari, it is necessary to examine this part of the record in detail.

After describing her husband's frustration during his convalescence from his injuries because he was not working, Mrs. Meyers concluded her testimony by describing, as follows, how her husband has been doing since he returned to his railroad job:

Q: How has he been doing?

A: I think . . Gary has realized that there's going to be some definite limitations with his arm and I believe he's trying to come to grips with those limitations. He's concerned a lot about his future. We have a senior and first-grader and he's concerned about, you know, what's coming for them. I don't think he has an idea in the world what he plans to do if he can't keep the job on the railroad, and I don't know if I can use the comparison but I would like to explain what that means to him. Can you do that by comparison?

Q: Give it a shot.

Mr. Antonini: Your Honor, may, if we can approach. Is there is a question pending, I guess . . .

Mr. Murray: Well, I mean, I think she's responding to my question.

The Court: She is. Go right ahead.

A: I'm trying to explain about what he feels about what he's facing right now with not knowing what's going to happen

with his job. There's one major activity to me that I can't explain how deeply I enjoy it and that's my horse and my showing off that and I get in a show and I feel like I'm on center stage and I'm proud of what I'm doing and I'm proud of how well I do it and I like everybody to see that. It's the one thing that I love to death, and that is the very same way my husband feels when he's running his crane or machinery because he's one of the best on the railroad. He's fast. He's efficient. And he's just, you know, in his glory when he's out there doing what he does well, and it's almost like stripping something away from him -- for him not being to do that for the period of time and maybe his future.

Q: I have nothing further. (Gail Meyers, TR Vol. 2, p. 367).

3. Cross-examination of Mrs. Meyers by Mr. Antonini

Q: You testified you noticed your husband was concerned about his future?

A: Very, yes.

Q: Concerned because he has a first grader?

A: Correct, and a senior and many other things.

Q: And you know that if he gets to do his three years, three years from

now he's going to get a disability pension up to $2,000 a month?

Mr. Murray: Objection.

The Court: Objection sustained.

Mr. Antonini: May we approach?

The Court: Yes (aside to reporter).

Mr. Murray: I'm going to move for a mistrial. I'm going to ask that the jury be instructed to disregard that. This man will never go on a disability and we're not even making that claim.

The Court: I think he said eligible.

Mr. Murray: . . . to throw out a figure like $2,000 is absolutely unfair. I ask that the jury be instructed to disregard it and I ask that you consider a mistrial. I think this is dreadfully improper. I've never heard anything like that in 30 years.

Mr. Antonini: Judge, under the FELA, once a plaintiff introduces evidence and opens the door about their financial situation, there's case law through the years that it is proper to show receipt of disability benefits.

The Court: I understand that but I don't think this is the proper witness to get this in through.

Mr. Antonini: She's opened the door.

The Court: She doesn't know anything about retirement benefits.

Mr. Antonini: She's complained about her financial situation, the concern about the future . .

The Court: I understand that, but you're going to have an opportunity to determine with exactitude the amount of those if she were to take them through your own witnesses. I don't think you can get it in through her.

Mr. Antonini: I'm done, but my point is this, I wasn't going to ask any questions. I'm surprised Tom got into her concern about her financial future because that is improper in an FELA case. Once you introduce evidence of your financial situation, we are allowed to show the receipt of benefits past and future.

Mr. Murray: I have never asked her a question about her financial situation. She wasn't asked any. She was asked for observations about how he (her husband) feels about . .

The Court: You can take her answer two ways. That is the impact it would have on the family if he couldn't work on the railroad or you could take it the financial impact like she never used financial.

Mr. Antonini: Well, that's what the implication in front of the jury is and he opened the door.

Mr. Murray: No, I have to have the right to go back. He would never take a disability under any theory and we are not even making that claim.

The Court: That claim's not in here.

Mr. Murray: And for him to suggest that he's going to get $2,000 when . . I have never heard of that. He wouldn't get $2,000 even if he were on disability. How can you even bring disability up much less throw a figure out? It's just horribly prejudicial.

Mr. Antonini: After 20 years under the Railroad Retirement Board, you are entitled to an occupational disability if you are disabled for any reason from your job up to $2,000 a month **if you're eligible**. She has testified about concern over their financial future. You have opened the door on it. I'm entitled to provide case law if necessary . .

The Court: But not through this witness.

Mr. Antonini: I'm done.

Mr. Murray: And I would ask, please remember . .

The Court: I will.

(End of aside to reporter).

The Court: Ladies and gentlemen, I have sustained an objection with regard to the issue of retirement which will be -- could become an issue at a later date but not through this witness so that you are to disregard the question and then the answer with regard to retirement. (Gail Meyers, TR Vol. 2, pp. 367-371).

REASONS FOR GRANTING THE WRIT

ARGUMENT

I. THE UNTRUE STATEMENT TO THE JURY THAT MEYERS WILL SOON "GET A DISABILITY PENSION UP TO $2,000 A MONTH" IS, UNDER LONG-STANDING HOLDINGS OF THIS COURT, INCURABLY PREJUDICIAL AND, THEREFORE, MEYERS IS ENTITLED TO A NEW TRIAL AS A MATTER OF LAW.

This Court long ago established the rule that the introduction of collateral source benefits in an FELA case or Jones Act case is so prejudicial to a jury's deliberation on the issue of damages as well as liability, that it constitutes reversible error, and entitles the plaintiff to a new trial. By affirming the trial court's decision that a statement to the jury that "**if he gets to do his three years, three years from now he's going to get a disability pension up to $2,000 a month**," does not entitle Meyers to a new trial, the court below departed from this Court's unequivocal holdings that, the unwarranted introduction of a collateral source is prejudicial as a matter of law.

Historically, this Court has held that the collateral source rule is a substantive evidentiary rule, which requires the exclusion of evidence of any collateral benefits; and this Court has repeatedly held in the context of an FELA case or Jones Act case, that introduction of collateral benefits is so prejudicial that, when a trial court permits its introduction, it commits reversible error as a matter of law. In Tipton v. Socony Mobile Oil Co., 375 US 34, 11 L.Ed.2d 4, 84 S.Ct. 1 (1963), reh. den. 375 US 936, 11 L.Ed.2d 268, 84 S.Ct. 328, a case brought under the Jones Act, the trial court admitted evidence over the

plaintiff's objection that he had accepted compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act. There was a defense verdict which was affirmed by the court of appeals on the grounds that the error was harmless because the jury never reached the issue of damages. This Court reversed the judgment of the court of appeals and remanded the case to the district court for a new trial. In doing so, it rejected the suggestion of the court of appeals that the prejudicial effect of the evidence of other compensation was restricted to the issue of damages and would not affect the determination of liability.

In Tipton, respondent's counsel emphasized to the jury that the petitioner-seaman "has a remedy under a federal compensation act, and in fact received benefits in the form of weekly payments under that act . . . " The only basis upon which it was argued that the foregoing statement was relevant was that it indicated what the petitioner thought to be his legal status. The judge did not frame a cautionary jury instruction but, instead, the judge's charge contained a discussion of the Longshoremen's and Harbor Workers' Compensation Act and a restatement of the disputed evidence, which only heightened the likelihood of prejudice. Tipton, 375 US at 35-36.

While deliberating, the jury sent a note to the judge, as follows:

> If we find Mr. Tipton is not a seaman or a member of the crew of Drilling Barge #1, does he have recourse for compensation under the outer continental shelf or other act?"

Tipton, 375 US at 36.

The judge immediately replied: "This is not a matter for the jury's consideration. You should consider only the questions submitted and the evidence thereon." Id.

This Court held that the judge's reply in Tipton was insufficient to overcome the cumulative impact of the evidence of other compensation as submitted to the jury and the instructions because while the judge's reply excluded from the jury's consideration the availability of alternative benefits in a future action, **it did not preclude or restrict consideration of the evidence presented concerning prior receipt of compensation payments. The direction of the court to consider "the questions submitted" was not illuminating, according to this Court, and further reference to "the evidence thereon" necessarily encompassed the admitted evidence of payments received and retained by petitioner.** Id.

This Court concluded that the prejudicial impact of the evidence of other compensation would not be restricted to damages because the evidence was presumably considered without qualification as to its bearing on a basic fact essential to liability. On such a record, this Court found that the disputed evidence could not properly be deemed harmless and vacated the decision of the court of appeals, remanding the case to the district court. Tipton, 375 US at 37.

Similarly, in Eichel v. New York Central R. Co., 375 US 253, 11 L.Ed.2d 307 (1963), 84 S.Ct. 316 (1963), an FELA case, this Court made it clear that evidence of the receipt of disability benefits under the Railroad Retirement Act is inadmissible. In Eichel, the district court excluded the fact that the plaintiff was receiving $190 a month in disability benefits, but the circuit court

held that it was prejudicial error to exclude this fact because it was relevant on the issue of plaintiff's motivation to return to work. This Court reinstated the plaintiff's verdict in the district court on the following basis:

> It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse. Similarly, we must recognize that the petitioner's receipt of collateral source insurance benefits involves a substantial likelihood of prejudicial impact. We hold, therefore, that the district court properly excluded the evidence of disability payments. 375 US at 255, 256.

The circuit courts of appeal have consistently followed this Court in requiring exclusion of collateral benefits and have not hesitated to apply both the letter and spirit of the holdings in Tipton and Eichel. In Wilcox v. Clinchfield R. Co., 747 F.2d 1059 (6th Cir. 1984), the plaintiff sued for personal injuries under the FELA on the grounds that his railroad employer had failed to provide him with a safe place to work. During jury deliberations, the district court, in response to an inquiry, told the jury that the plaintiff had received payment for medical expenses and "last time worked." Shortly thereafter, the jury returned a defense verdict.

The Sixth Circuit Court of Appeals, referring to Tipton and Eichel as "firmly established law," reversed the judgment entered on the jury's verdict and remanded the case for a new trial. Noting that the Tipton and Eichel cases were "not exactly on point factually with our instant case . . .," the court stated that

> **They do indicate the strength of the legal rulings which prohibit a defendant from showing collateral benefits which an injured party may have received which might influence a jury in adversely determining the issue of liability**. In our instant case, we do not find any explanation of the inapplicability of the collateral benefits or any mitigation of the prejudicial effect of the two questions and the judge's answers here involved.

(Emphasis added). Wilcox at p. 1061.

The Sixth Circuit Court of Appeals concluded its opinion in Wilcox by citing a case from the Fifth Circuit in which the prejudicial effect of advising the jury of collateral benefits was affirmed. The court stated that we find no substantial basis "for distinguishing this case from Eichel and Tipton." The Fifth Circuit opinion continued:

> Both Tipton and Eichel reflect a strong policy against the use of such collateral source evidence in FELA and analogous Jones Act-maritime law seamen's cases. With the whole result in our case being the enigma wrapped in the mystery of a general verdict concealing forevermore the use or uses to which the jury might have put this evidence, we cannot say that the error, preserved by emphatic and timely objection, was harmless.

Wilcox at 1061, 1062.

All courts addressing this issue have made it clear that the benefit of the collateral source rule is not waived unless plaintiff interjects his dire financial condition on direct or cross-examination. No other court has departed from this standard. All circuits agree that, at the very least, any deviation from the rule requires plaintiff to raise an issue of credibility with the jury to permit the opposing party to attack the claim of financial distress by showing that other financial assistance is available. For example, in Lange v. Missouri Pacific R. Co., 703 F.2d 322 (8th Cir. 1983), plaintiff testified on direct examination that he returned to work because he had to support his family. Once this door was opened, the trial court allowed cross-examination regarding plaintiff's receipt of disability in order to test the credibility of plaintiff's assertion that he was unable to support his family if he did not return to work. Lange at p.324. See also Brandt v. Vulcin, Inc., 30 F.3d 752, 760 (7th Cir. 1994); Cowens v. Siemen's Elema AB, 837 F.2d 817, 824, 825 (8th Cir. 1988); Gladden v. P. Henderson & Co., 385 F.2d 480, 483-484 (3rd Cir. 1967), cert. den. 390 US 1013; Gates v. Shell Oil, 812 F.2d 1509, 1513 (5th Cir. 1987), reh. en. banc. 881 F.2d 215, cert. den. 494 US 117, 110 S. Ct. 1320; and Moore v. Missouri Pacific R. Co., 825 S.W.2d 839, 842-843 (Mo. 1992).

Prior to the instant case, the same standard was applied by the Sixth Circuit. In Sullivan v. Chesapeake & Ohio Railway Co., 1991 WL 216872 (6th Cir. 1991) (unpublished), cert. den., __ US __, 118 L.Ed.2d 552 (1991), for example, a recent case on point, plaintiff's counsel asked his client if he had received "any salary, wages or money from the railroad" during the time he was off work with his injuries and the plaintiff testified that the railroad had not "given me any money at all since I've been off." On cross-examination, railroad counsel asked the plaintiff: "You're not telling this jury you didn't get any

other types of benefits during that time, are you?" This question prompted an objection from plaintiff's counsel and a motion for a mistrial, which was denied. The court, in explaining the rationale for its refusal to apply Eichel, stated as follows, at page 11:

> The boundary of silence was crossed when plaintiff affirmatively presented on direct examination the reason why he had returned to work after seven weeks and had not again visited his physician. The trial court therefore was justified in opening the door for cross-examination for the narrow purpose of testing the credibility of plaintiff's assertions.
> (Emphasis added).

The Sullivan court makes it clear that the door was opened for the introduction of collateral benefits only because the plaintiff made the question of "whether he had received financial assistance," an issue "affecting the credibility" of the plaintiff. In the instant case, we have the very converse of the circumstances which existed in Sullivan.

The decision below is a radical departure from this Court's interpretation of the collateral source rule and the Sixth Circuit's application of the rule in prior decisions.

Although Mrs. Meyers testified that her husband is concerned about his future and that of his family, her testimony refers to the fact that her husband loves his railroad job and that he has no idea in the world what he plans to do if he can't keep the job on the railroad. (Gail Meyers, TR Vol. 2, p. 366). Because Mr. Meyers made no claim that he would ever be unable to find other gainful employment and, therefore, he can never become

eligible for disability benefits under the Railroad Retirement Act, this is clearly not an attempt to plead poverty but, rather, a straight forward and honest statement about Mr. Meyers' love for his job and a concern about the effect his injuries have had on his life. Such testimony can hardly be given without referring to a person's ability to enjoy life, including his family activities with his children. In this context, therefore, counsel's statement regarding a collateral source was both untrue and irrelevant.

The "opened door" exception to the collateral source rule recognized in Sullivan, implicitly imposes a duty on a party seeking to introduce collateral benefits to do so accurately and in a way which does not mislead the jury and the court. The statement by N&W's counsel in the presence of the jury that Meyers, **"if he gets to do his three years, three years from now he's going to get a disability pension up to $2,000 a month,"** was prejudicial to the rights of plaintiff in at least three respects:

1. It was an intentional and unwarranted violation of the collateral source rule;

2. It was factually untrue and grossly misleading; and

3. It created a circumstance in which the trial judge, in an effort to remedy the harm done, gave an instruction to the jury which compounded the prejudicial effect of the statement.

Any one of these results would justify reversal. Taken in combination, they represent conduct so prejudicial to the rights of Meyers, that they may be without precedent in the history of the FELA or the Jones Act.

Counsel's statement, advising the jury of collateral benefits that plaintiff "**if he gets to go his three years, three years from now he's going to get a disability pension of up to $2,000 a month,**" was without basis in fact and was calculated to leave the jury with the impression that: (1) Mr. Meyers will automatically be eligible to receive a $2,000 a month "pension" at age 41; (2) the amount of the monthly "pension" will be $2,000; and (3) Mr. Meyers will have the option of continuing on the railroad or taking a "pension," while still being able to work at other employment. The statement was, therefore, inherently prejudicial because it permitted the jury to consider evidence of a collateral source that was not merely speculative, but without any basis in fact.

Firstly, at the sidebar following the vehement objection of Meyers' counsel to this statement made by N&W, counsel for N&W informed the judge that:

> After 20 years under the railroad retirement board, you are entitled to occupational disability if you are disabled any reason from your job up to $2,000 a month (if) you're eligible.

(Gail Meyers, TR Vol. 2, p. 370). This exchange unequivocally shows that what N&W's counsel did was to arbitrarily pick the maximum amount of money which a disabled railroader could possibly be eligible to receive and used that figure to suggest that Mr. Meyers, in fact, will be able to collect that amount of money after three years.

Secondly, to qualify for an occupational disability annuity, an injured railroad worker must first meet the eligibility requirements of the railroad retirement board,

including a medical disqualification by a doctor selected by the board. Moreover, a railroad employee cannot receive an occupational disability annuity if he is gainfully employed. The assertion by N&W's counsel, therefore, was calculated to leave the jury with an impression that was especially misleading because the record makes it clear that Meyers has neither qualified for railroad disability benefits, nor has he claimed that he will be disabled from gainful employment in the future. To the contrary, all of the evidence supported a finding that Meyers is and will continue to be gainfully employed.

Thirdly, an occupational disability annuity is paid to an employee from the time that he becomes disabled from his railroad job until he reaches retirement age, and is clearly a collateral benefit subject to the collateral source rule. The question of whether an injured railroader will, in fact, receive less retirement benefits because of an injury, has nothing to do with the collateral source rule but only bears on the level of economic loss which an injured plaintiff is entitled to recover. By suggesting to the jury that the court had sustained plaintiff's objection regarding an issue of "retirement," the jury might well have taken the curative instruction to mean that the statement of N&W's counsel about $2,000 a month "pension," referred to a retirement benefit which the plaintiff will be able to receive in just three year's time. This was so terribly prejudicial because the jury could easily have assumed that the railroad has some kind of retirement program under which Mr. Meyers will be able to receive a $2,000 a month pension in just three year's time. This simply is not the case.

As in Eichel, where the court found that the judge's reply to the jury's question was insufficient to overcome the impact of the evidence of the other compensation, the judge's confusing instruction to the jury to disregard the

question and answer concerning the issue of "retirement," did not preclude or restrict the jury from considering the misleading and inaccurate statement of N&W's counsel regarding a disability pension. Therefore, the court's statement to the jury was not a curative instruction at all. Rather, it was a statement to the jury suggesting that the improper statement of N&W's counsel was a reference to issues bearing on Meyers "retirement," which:

> Could become an issue at a later date but not through this witness so that you are to disregard the question and then the answer with regard to retirement.

(Gail Meyers, TR Vol. 2, p. 371). Consequently, the trial judge, presiding over his first jury trial, was forced into a position where his attempt to cure the prejudice done to Meyers actually served to increase the harm done because it suggested that there was truth in the statement made by N&W's counsel.

The instruction by the court in the instant case, therefore, was far more misleading and prejudicial than the judge's interplay with the jury in Tipton, where the jury was permitted to consider the evidence presented concerning past receipt of compensation benefits. In the case at hand, the judge's statement left the jury with the impression that plaintiff is seeking a double recovery for many of the future damages that are claimed.

The result below mocks the doctrine of *stare decisis*. It invites a lawless approach to trials under FELA or Jones Act. It allows counsel to use virtually any pretext to violate the collateral source rule without regard to the accuracy of the assertion made in the presence of the jury. In the instant case, a dedicated and loyal employee was denied a fair trial because railroad counsel

intentionally ignored both the letter and spirit of this Court's holdings in Eichel and Tipton. Because the collateral source rule is crucial to the integrity of trials under the FELA and Jones Act, this Court should grant a writ of certiorari to reaffirm the vitality of this rule.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH A DECISION OF THE FIFTH CIRCUIT CONCERNING WHETHER A "CAREFUL QUALIFYING JURY INSTRUCTION" CAN OVERCOME THE HARM CAUSED BY PERMITTING EVIDENCE OF COLLATERAL BENEFITS IN AN FELA CASE.

In Eichel and Tipton, this Court adopted the collateral source rule without exception. Thus, in Tipton, this Court held that evidence showing the receipt of compensation benefits to prove that a party was a longshoreman and not a seaman was inadmissible. Tipton, 375 US at 37, 84 S.Ct. at 3, 11 L.Ed.2d at 6. This Court held in Eichel, that "in our view the likelihood of misuse by the jury clearly outweighs the value of this evidence." See Eichel 375 US 253, 255, 84 S.Ct. 316, 317 11 L.Ed. 2d 307, 309 (1963). In Eichel and Tipton, this Court, therefore, left an open issue as to whether a cautionary jury instruction could, under any circumstances, counterbalance the potential for harm caused by the introduction of collateral benefits. Not surprisingly, without guidance on this very important issue, the potential for confusion and conflicting results in circuit court decisions is self-evident by reviewing the different results reached on this issue in the Fifth Circuit and Sixth Circuit in the instant case.

In Savoie v. Otto Candies, Inc., 692 F.2d 363 (5th Cir. 1982), the Fifth Circuit carved an exception to the general rule set forth in Tipton and Eichel when there is

(1) little likelihood of prejudice; (2) a careful qualifying jury instruction is given; and (3) no strong potential for improper use. If these three requirements are met, the Fifth Circuit held that the receipt of compensation benefits may be admissible for the limited purpose of proving another matter. In Savoie, a Jones Act case, the court permitted evidence of payment of seaman's maintenance to plaintiff as relevant in bearing upon whether the plaintiff had the status of a seaman at the time of the injury. The jury was specifically instructed, however, that the payment of maintenance could only be considered as circumstantial evidence of the other factual elements going to the issue of plaintiff's seaman's status. Savoie at 370.

In Simmons v. Hoegh Line, 784 F.2d 1234 (5th Cir. 1986), a longshoreman's action to recover damages for injury from the vessel owner, the Fifth Circuit clarified the third prong of the Savoie test for the narrow purpose of admitting collateral benefits, and set forth what was required for a "careful qualifying jury instruction" to guarantee that plaintiff will not be prejudiced by the jury's misuse of the collateral source evidence. The court held that such an "instruction" must clearly inform the jury that it is not to consider the receipt of benefits, nor the amount of payments in determining any issue of fault or damages.[1]

In Sheehy v. Southern Pac. Transp. Co, 631 F.2d 649 (9th Cir. 1980), an FELA action, the Ninth Circuit held evidence inadmissible that plaintiff was receiving disability pension payments as bearing on the extent or

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[1] The Fifth Circuit in Simmons indicated that the preferred form of jury instruction, is the following: "Neither the fact that payments have been made to Plaintiff under the Act, nor the amount of payments, is to be considered in any way, in determining any issue as to fault or blame or liability or damage in this case." Simmons at p. 1237, n.1.

duration of his injury, or to show his motive for not returning to work. The court held that the trial court's limiting instruction, which simply informed the jury that it could not reduce plaintiff's award by the amount of collateral benefits, was not sufficient to cure the potential error of allowing evidence of collateral benefits to be introduced in the first place. Further, the court held that the Eichel rule was not displaced by Federal Rule of Evidence 403 which provides great discretion to trial judges to make evidentiary rulings. The court held that "Rule 403 is designed as a guide for the handling of situations in which no specific rules have been formulated. . . " and "that nothing in the new federal rules of evidence authorized departure from the Eichel holding." Sheehy at 652. See also Riddle v. Exxon Transp. Co., 563 F.2d 1103, 1107 (4th Cir. 1977).

In Green v. Denver & Rio Grande Western R. Co., 59 F.3d 1029 (10th Cir. 1995), cert. den. 116 S. Ct. 565, another recent FELA action, the Tenth Circuit approving Sheehy, held that the collateral source rule prohibits admission of evidence of plaintiff's Railroad Retirement Act ("RRA") disability benefits to offset damages because as the court reasoned, the RRA is essentially social security and not directly attributable to a defendant railroad. The court stated at p. 1034, as follows:

> The district court here gave no instruction to the jury limiting the use of the disability payments to determinations on damages, and/or cautioning them not to consider disability payments in their deliberations on negligence.

Even though defense counsel did not argue to the jury that the disability benefits might result in a double recovery for plaintiff, the Ninth Circuit held that "the

admission of such evidence, particularly without any limiting instruction, was reversible error." Green at 1034.

The Fifth, Ninth and Tenth circuit court decisions indicate that there is no clear agreement among the circuits on the issue of whether, under any circumstances, evidence of collateral benefits may be introduced in an FELA action without causing prejudice to plaintiff as a matter of law. These decisions do, however, clearly support the conclusion that any limiting instruction necessary to cure the prejudice caused by evidence of collateral source benefits in an FELA case must, at the very least, include clear language preventing the jury from misusing such evidence on the issues of liability and damages.

In the instant case, the Sixth Circuit completely departed from the Fifth, Ninth and Tenth circuit court decisions cited above in finding that the trial judge's comments in the instant case constituted a sufficient "instruction" to dispel any harm caused by the false and misleading statements by N&W's counsel in the jury's presence that Meyers will soon be entitled to disability benefits up to $2,000 a month. The trial court's statement to the jury was, as follows:

> I have sustained an objection with regard to the issue of retirement which will be -- could become an issue at a later date but not through this witness so that you are to disregard the question and then the answer with regard to retirement.

(Gail Meyers, TR Vol. 2, p. 371). This statement does not meet the standard applied by any circuit in a prior decision on the issue of what constitutes a proper curative instruction under the circumstances because it

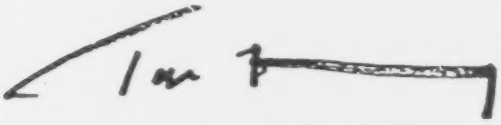
clearly does not tell the jury that it is to disregard any future disability benefits up to $2,000 a month, or retirement as bearing on its determination of liability or damages, but, instead, practically guarantees that the jury assumed that Meyers was seeking a double recovery. The Meyers' decision, therefore, represents a compelling reason for this Court to decide whether there is any justification for admitting evidence of collateral benefits in an FELA action and, if so, what constitutes an appropriate instruction to the jury to prevent the known likelihood that the jury will be more apt to find no liability when they are aware that the plaintiff has already received compensation, or to misuse the evidence in determining damages.

All circuits have recognized that evidence of other compensation affects the liability determination as well as the damages determined by the jury. What the Sixth Circuit has created, therefore, is a state of affairs in which the district courts in Ohio and elsewhere will be looking for guidance on the questions raised by this petition and, until such guidance is forthcoming, permit decisions interpreting the collateral source rule in FELA and Jones Act cases to remain a source of confusion, conflicting decisions, and potentially unjust results. The conflict among circuit court decisions, therefore, provides this Court with an opportunity to resolve a question which has far reaching implications for all injured railroad workers and seamen, for countless victims of work-related injuries that may be disabled from any gainful employment after years of loyal service, for federal and state courts, and for the railroad and marine industries.

CONCLUSION

For the foregoing reasons, petitioner Gary A. Meyers requests that this Court grant certiorari in the above-captioned matter.

Respectfully submitted,



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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

No. 95-3408

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Gary A. Meyers,	)	
	)	
Plaintiff-Appellant,	)	**ON APPEAL** FROM
	)	THE UNITED STATES
vs.	)	DISTRICT COURT
	)	FOR THE NORTHERN
Norfolk and Western	)	DISTRICT OF OHIO
	)	
Defendant-Appellee	)	**MEMORANDUM**
	)	**OPINION**

BEFORE: KEITH, NORRIS and DAUGHTREY, Circuit Judges.

PER CURIAM. Following a jury verdict for defendant, Norfolk and Western Railway Company, plaintiff, Gary A. Meyers, filed a motion for a new trial. He now appeals from an order of the district court denying that motion.

Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of the parties, we are not persuaded that the district court erred in denying the motion for a new trial.

Because the reasoning which supports the denial of the motion for a new trial has been articulated by the district court, the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the order of the district court is **affirmed** upon the reasoning employed by that court in its Memorandum Opinion dated February 28, 1995.

APPENDIX B

Northern District of Ohio
FILED
February 28, 1995
At Toledo
Clerk, U.S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CIVIL ACTION NO. 92-7500

GARY A. MEYERS Plaintiff, v. NORFOLK AND WESTERN RAILWAY CO., Defendant	)	**Memorandum Opinion**

KATZ, J.

This case is before the Court on Plaintiff's motion for a new trial. For the reasons set forth below, such motion will be overruled.

I. Background

Plaintiff filed suit against Defendant pursuant to the Federal Employers Liability Act ("FELA"), 45 U.S.C. §51, *et seq.*, to recover for injuries he sustained when he fell from a crane bucket while attempting to repair a crane. The case went to trial for four and one-half days, at the end of which the jury returned a verdict for the Defendant, finding that it had not been negligent.

II. Standard of Review.

In reviewing a motion for a new trial under Fed. R. Civ. P. 59, this Court is guided by Fed. R. Civ. P. 61 which states:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Further, because Plaintiff in the instant case challenges the verdict as against the weight of the evidence, he must show that the jury's verdict is against the "clear" weight of the evidence. *J.C. Wyckoff & Assoc., Inc. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1487 (6th Cir. 1991). The Court is prohibited from granting a motion for a new trial "if the verdict is one

which could reasonably have been reached." *Id.* Moreover, "the verdict should not be considered unreasonable simply because difference inferences and conclusions should have been drawn or because other results are more reasonable." *Id.* In cases brought under the FELA, "only when there is a complete absence of probative facts to support the finding . . . does a reversible error appear." *Clark v. Kentucky & Indiana Term R.R.*, 728 F.2d 307, 310 (6th Cir. 1984).

III. Plaintiff's Grounds for a New Trial

A. Defendant Counsel's Question Regarding Collateral Benefits

In his cross examination of the Plaintiff's wife, defense counsel asked Mrs. Meyers whether she was "aware of the fact that her husband in a few years would be eligible for a pension which would be him $2000.00 a month." Plaintiff's counsel objected and moved for a mistrial. The Court overruled the motion for a mistrial and gave the jury a curative instruction, directing them to disregard the question.

Plaintiff now seeks a new trial on the ground that the question by defense counsel to Plaintiff's wife constituted an irreconcilably prejudicial comment that entitles Plaintiff, as a matter of law, to a new trial. This motion is not well taken for two reasons.

First, the Court overruled the motion for new trial and gave a curative instruction to the jury. Plaintiff's counsel did not renew his motion for a mistrial following the curative instruction. Therefore, he has failed to properly preserve the issue, and has waived it. *See* 33 Fed Proc, L Ed §§ 77:188-189.

Second, on substantive grounds, Plaintiff's argument cannot succeed. On direct examination, Plaintiff's counsel had elicited testimony from Plaintiff's wife concerning her and her husband's concerns over anticipated future financial distress. Accordingly, Defendant claims that such affirmative testimony regarding financial distress opened the door to cross-examination regarding expected benefits.

Plaintiff argued that this issued is controlled by *Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253 (1963), in which the Court held that a railroad may not introduce evidence of disability payments to prove malingering by the plaintiff. Defendant, however, contends that this case is more properly addressed under the exception to *Eichel* enunciated in *Gladden v. P. Henderson & Co.*, 385 F.2d 480, 483-84 (3rd Cir. 1967), *cert. denied*, 390 U.S. 1013 (1968), and adopted by the Sixth Circuit in *Sullivan v. Chesapeake & Ohio Rwy. Co.*, Case Nos. 90-1136, 90-1412, 1991 WL 216872 (6th Cir. Oct 25, 1991). The *Gladden* court held that the "barriers which have been created against the admission of otherwise relevant evidence because of its prejudicial effect do not extend to the affirmative volunteering by a plaintiff of testimony which breaks into this restricted area." *Id.* at 484. *See also, Lange v. Missouri P.R. Co.*, 703 F.2d 322 (8th Cir. 1983).

In the instant case, Plaintiff's wife's testimony on direct arguably opened the door to defense counsel's question. As such, the Court's instruction to disregard the question was sufficient to cure the problem. The question to which Plaintiff's counsel objects does not constitute grounds for a new trial.

B. Defense Counsel's Remark During Closing Argument

Plaintiff also asserts that he is entitled to a new trial because, in Defendant's closing argument, defense counsel stated that the Defendant would have to make accommodations for Plaintiff's injuries or "the railroad will be in trouble with this judge." This too is a meritless argument because Plaintiff's Counsel did not object to defense counsel's statement at the time it was made. Any objection, therefore, is waived. *See* Fed Proc, L Ed §§ 77:188-189.

C. Verdict Goes Against the Clear Weight of the Evidence

Plaintiff also contends that this Court must grant a new trial because the verdict was against the manifest weight of the evidence. Plaintiff argues that it is undisputed that he never received any guidance or training as to how to make repairs on his crane. Plaintiff contends that reasonable minds, therefore, could not conclude that the Defendant fulfilled its non-delegable duty to provide Plaintiff with guidance and training as to how the work he was doing at the time he was injured should be safely be performed.

This Court is not persuaded by Plaintiff's contentions. Testimony was presented to the jury regarding the numerous different cranes Plaintiff had operated, and the manner in which he went about repairing the crane in question. Defendant argued to the jury that Plaintiff could have repaired the crane in any of three safe manners. It was entirely within the province of the jury to determine that the Defendant was not negligent.

Plaintiff also argues that because the civil justice system in the United States is under attack and because

juries are prejudiced against plaintiffs due to the negative publicity large jury awards receive in the political arena, in legislatures, in newspapers, and on talk shows, the jury's verdict in the instant case is patently unfair. Plaintiff theorizes that

> these attacks on the judicial system have created a clear and present risk of prejudice to injured people seeking compensation from juries made up of people at whom this massive assault is transparently aimed. When civil trials take place in this kind of climate, there is, we submit, a special obligation on the part of the Court to consider whether the result reached by a jury may have been the result of passion or prejudice.

(Motion for New Trial at 12.)

This Court is unconvinced by this argument. The Court cannot control the attitudes of jurors nor the media outlets that may shape those attitudes. Further, the Plaintiff is the one who demanded a jury trial. He cannot now argue that he is entitled to a new trial because the jury found for the Defendant.

IV. CONCLUSION

For the reasons set forth above, the Plaintiff's motion for a new trial is overruled.

IT IS SO ORDERED.

DAVID A. KATZ
U.S. DISTRICT JUDGE